INDEX

Opinions Below 1
Jurisdiction 2
Question Presented 2
Constitutional Provisions and Statutes Involved 2
Statement of the Case 2
Argument 3
Conclusion 4

Citations

Cases

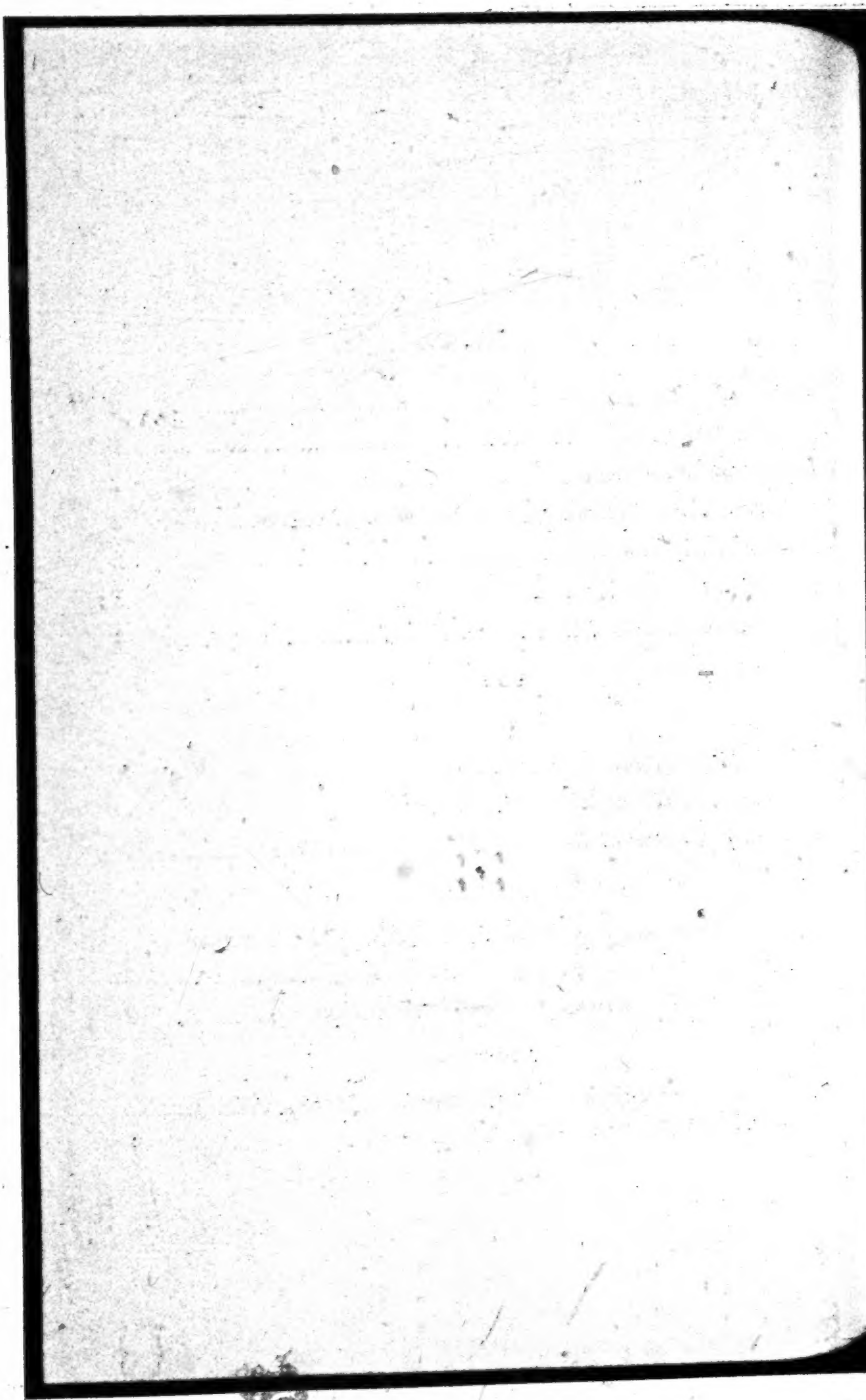
Hans v. *Louisiana*, 134 U.S. 1 (1890) 3
Maryland v. *Wirtz*, 392 U.S. 183 (1968) 4
Parden v. *Terminal Ry. Co.*, 377 U.S. 184 (1964) 3

Constitution

Article I, Section 8, Clause 3, United States Constitution 2
Amendment XI, United States Constitution 2

Statutes

Fair Labor Standards Amendment of 1966, Pub. L. No. 89-601, 80 Stat. 830 4



IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-1021

EMPLOYEES OF THE DEPARTMENT OF PUBLIC HEALTH AND WELFARE, STATE OF MISSOURI, et al.,
Petitioners,

vs.

DEPARTMENT OF PUBLIC HEALTH AND WELFARE, STATE OF MISSOURI, et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals en banc is as yet unreported. It is set forth with the dissenting opinions in Appendix A to the Petition for Writ of Certiorari at 1a-25a. The opinion of a three-judge panel of the Court of Appeals, prior to rehearing by the court en banc, is unreported and is set out in Appendix A of the Petition at 26a-37a. The order of the district court granting respondents' motion to

dismiss the complaint is also unreported and is printed in Appendix A of the Petition at 39a-40a.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED

Whether Congress in extending coverage of the Fair Labor Standards Act to employees of publicly owned schools and hospitals intended a state waive its immunity from suit in federal court as a condition of operating schools and hospitals.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, Article I, Section 8, Clause 3.

United States Constitution, Amendment XI.

The Fair Labor Standards Act as amended, Sections 3(d), (r), (s), 16(b), (c), and 17, 29 U.S.C. Section 203 et seq.

The text of these constitutional and statutory sections may be found in Appendix B of the Petition.

STATEMENT OF THE CASE

The statement of the case set forth in the Petition is generally satisfactory. The majority opinion of the three-judge panel of the Eighth Circuit states that the parties agreed that the suit was primarily directed against the State of Missouri (Appendix A to the Petition at 27a). On rehearing before the Court of Appeals en banc, the petitioners stated in their reply brief that they ". . . do not contest the point that the state agencies and individuals named as defendants in this suit have available to them

the defense afforded to states under the doctrine of immunity set forth in the Eleventh Amendment . . ." (Appellant's Reply Brief, page 4).

While petitioners purport to maintain a class action suit, the court below found that the issue of whether there were members of the class other than the forty-eight individually named plaintiffs to be immaterial in view of its decision upholding dismissal of the complaint and expressed no opinion on that question. (Footnote 2 of the opinion, as reprinted in Appendix A of the Petition.)

ARGUMENT

The decision below is clearly correct.

Since *Hans* v. *Louisiana*, 134 U.S. 1 (1890), it has been settled law that the doctrine of sovereign immunity and the Eleventh Amendment bar suit in federal court by citizens of a state against that state.

In affirming the dismissal of the complaint, the court below merely reaffirmed the proposition that agencies of the State of Missouri cannot be sued by private citizens in federal courts.

The court below expressly recognized the possibility that Missouri could waive its immunity from suit in federal court. However, the court was convinced that Missouri had not waived that immunity in the instant action.

In reaching the conclusion that Missouri had not consented to suit in the federal court, the court acknowledged this court's decision in *Parden* v. *Terminal Ry. Co.*, 377 U.S. 184 (1964). However, the court found that the factual basis for waiver of immunity in the *Parden* case would have to be "enlarged and extended to fit the present case." That course the Eighth Circuit quite properly declined.

It has been suggested by the petitioners that the court below asserted a balancing test to determine whether the

Commerce Clause takes precedence over the Eleventh Amendment; and that such a test is in conflict with this court's holding in *Maryland* v. *Wirtz*, 392 U.S. 183 (1968). In fact, the language in the opinion below as to the relationship between the Commerce Clause and the Eleventh Amendment it as most dictum. The court found that Congress in extending coverage of the FLSA in 1966[1] to certain public employees did not intend that the states relinquish immunity from suit in the federal courts with respect to claims of covered employees arising out of that act. Since the court found no Congressional intent to subject states to suits under the FLSA, it did not have to decide the question of whether the Commerce Clause took precedence over the Eleventh Amendment.

In essence, the court below has merely reaffirmed the proposition that states are immune from suit in federal court; and, that the Fair Labor Standards Act evidences no intent on the part of Congress to diminish such immunity. That holding is clearly correct and amply supported in the opinion.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

JOHN C. DANFORTH
Attorney General
CHARLES A. BLACKMAR
Assistant Attorney General
Supreme Court Building
Jefferson City, Missouri 65101
Attorneys for Respondents

---

1. Fair Labor Standards Amendment of 1966, Pub. L. No. 89-601, 80 Stat. 830.